No. 75-1317

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

R. S. ZARKOS, T. M. DACY, SR.,
R. ALBRIGHT, DOE I, DOE II
and DOE III,

Petitioners,

vs.

ELIZABETH RUTH RIGGS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION ONE

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IN THE SUPREME COURT OF THE UNITED STATES

R. S. ZARKOS, R. M. DACY, SR.,
R. ALBRIGHT, DOE I, DOE II
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BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH DISTRICT,
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JURISDICTION

The petition for certiorari to the California Court of Appeal, Fourth District, Division One, invokes this Court's jurisdiction under 28 U.S.C. Section 1257 and United States Supreme Court Rule 19. Respondent respectfully submits that jurisdiction is improperly invoked by petitioners.

It is well settled that jurisdiction pursuant to 28 U.S.C. Section 1257 requires a final judgment by the highest court of

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the State in which a decision could be had. *Gospel Army v. Los Angeles*, 331 U.S. 543, 546-547; *Dept. of Banking v. Pink*, 317 U.S. 254, 268; *Market Street Railway Co. v. Railroad Commissioner of California, et al.*, 324 U.S. 548, 551; *Radio Station WOW v. Johnson*, 336 U.S. 120, 124. Certiorari is sought in this case based upon the overruling of petitioner's demurrer by the Superior Court, County of San Diego, State of California, and the denial of a writ of mandate by the California Court of Appeal, Fourth Judicial District, Division One. This determination by the California Court is not a final judgment, nor does it amount to an effective termination of the litigation between the parties. *See* West's California Annotated Code of Civil Procedure, Section 472a.

Respondent contends further that no federal question of substance is presented by the petition for certiorari. Though petitioner alleges a federal question of substance, the mere averment is not sufficient. *Parker v. McLain*, 237 U.S. 469. This Court has held on numerous past occasions that concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States is the rule rather than the exception. *Grubb v. P.U.C.*, 281 U.S. 470, 476; *Testa v. Katt*, 330 U.S. 386.

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Finally, respondent contends that an adequate and independent state ground exists to support the lower court determination that the California Tort Claims Act (California Government Code section 810, *et seq.*) does not apply to claims based on 42 U.S.C. section 1983. Section 1983 contains no limitation period within which suit must be brought. The general rule, therefore, is that the applicable state limitation period will govern.

It is wholly within the competence of the California State Courts to determine whether the provisions of the Tort Claims Act are to be construed as a general statute of limitations. Although petitioners contend that the California Courts would construe the Tort Claims Act as a general limitation provision, this simply is not the case. In its most recent pronouncement on the subject, the California Supreme Court construed the claims provisions of California Government Code section 911.2 as a condition precedent to the maintenance of an action under *state law* but the claims limitation could not apply to federal civil rights litigants. *Williams v. Horvath,* (L.A. 30460), Administrative Office of the Courts News Release No. 53 (decided May 4, 1976). (See attached Exhibit "A").

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It is well settled that the existence of an adequate and independent state ground of decision precludes review by this Court. *Harb v. Pitcairn,* 324 U.S. 117, 126-127.

Respondent therefore asks this Court to deny petitioners' petition for certiorari because:

1. No federal question of substance has been presented for determination;

2. No final judgment amounting to an effective termination of the litigation between the parties exists; and

3. An adequate and independent state ground for decision on the application of the California Tort Claims Act does exist.

QUESTIONS PRESENTED

1. Can a state court of general jurisdiction entertain actions brought pursuant to 42 U.S.C. section 1983?

2. Does the 100 day claims provisions of California Government Code 911.2 apply to bar actions in state courts predicated on section 1983, if no claim is filed?

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. 1988 states:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and

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disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment found on the party found guilty."

28 U.S.C. 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

. . . .

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Consitution or the United States or by any Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States;

. . . ."

California Government Code 911.2 provides:

"A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action."

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ARGUMENT

I

THE DECISION BELOW ALLOWING FEDERAL CIVIL RIGHTS ACTIONS PURSUANT TO 42 U.S.C. SECTION 1983 TO BE ENTERTAINED IN STATE COURTS OF COMPETENT JURISDICTION IS CORRECT AND MERITS NO FURTHER REVIEW BY THIS COURT.

This Court on numerous past occasions has taken the opportunity to delineate the distribution of judicial power between the federal and state judicial systems. The general doctrine emerging from these decisions is that state courts possess concurrent jurisdiction with federal courts over civil cases in law or equity arising under the Constitution or laws of the United States. Congress may provide for federal exclusivity under Article I, Section 8, Clause 9 of the United States Constitution. Where Congress has not so provided state courts are competent to entertain cases predicated on federal law. As stated by this Court in *Claflin v. Houseman*, 93 U.S. 130:

> Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent

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> to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction. *Id.* at 136-137.

In fact, as this Court stated in *McKnett v. St. Louis & S. F. R. R.*, 292 U.S. 230:

> [T]he Federal Constitution prohibits State courts of general jurisdiction from refusing to [enforce a cause of action] solely because the suit is brought under Federal law. *Id.* at 233.

Title 42 U.S.C. §1983 does not in itself contain any gr of jurisdiction to federal courts. Such jurisdiction would exist under 28 U.S.C. §§1331 and 1332, assuming the jurisdictiona prerequisites could be established. In addition, 28 U.S.C. secti 1343 grants original jurisdiction to Federal District Courts over Federal Civil Rights actions.

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Though these jurisdictional statutes do not preclude state court jurisdiction, petitioners argue against the general doctrine of concurrent jurisdiction by seizing on isolated language used by this Court in construing section 1983. Respondent submits that this argument has no merit. There is no question that section 1983 is designed to "afford a federal right in federal courts" (*Monroe v. Pape*, 365 U.S. 167, 180), nor that its purpose "was to interpose the federal courts between the states and the people" nor even that it created "a specific and uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225 at 237, 242). Petitioners' conclusion from the review of this language, that Congress intended federal exclusivity, does not follow. The granting of jurisdiction to federal courts does not necessitate the restriction of state court jurisdiction. The uniqueness of this federal remedy in federal courts is simply descriptive of the jurisdictional state of affairs existing at the time the Ku Klux Act of 1871 (the predecessor of section 1983) was passed. Federal original "arising under" jurisdiction did not exist at this time. It was not until 1875 that Congress granted such jurisdiction to Federal District Courts. Act of March 3, 1875, Section 1, 18 Stat. 470; *District of Columbia v. Carter*,

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409 U.S. 418, 427-428, n. 20. In light of this fact, the grant of original jurisdiction to federal courts in the predecessor of section 1983 clearly created a "unique federal remedy." *See also Sullivan v. Little Hunting Park*, 396 U.S. 229, 238.

Because of the long history of cases construing the distribution of judicial power and the lack of any indication of Congressional intent contrary to the general doctrine of concurrent jurisdiction announced in these cases, respondent would ask this Court to declare that state courts of competent jurisdiction can and indeed must entertain actions predicated on section 1983. 1/

1/ Federal and state cases dealing with the concurrent jurisdiction issue include:

Davis v. Towe, 379 F. Supp. 536, 538 (1974); *Horn v. O'Cheskey*, 378 F. Supp. 1280, 1287 (1974), *Long v. District of Columbia*, 469 F.2d 927, 937 (1972); *Brown v. Pitchess*, 13 Cal.3d 518 (1975).

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II

THE 100 DAY CLAIMS PROVISION IN CALIFORNIA GOVERNMENT CODE SECTION 911.2 IS NOT A LIMITATION PERIOD BARRING 42 U.S.C. SECTION 1983 ACTIONS BROUGHT IN STATE COURTS.

Title 42 U.S.C. section 1983 contains no federal limitation period. Petitioners contend that the claims statute should be construed as the applicable statute of limitation. Such a construction of Government Code 911.2 would be in derrogation of the California Supreme Court opinion of *Williams v. Horvath*, (May 4, 1976), *supra*, as well as federal court determinations of the applicable California limitation period. *Smith v. Cremins*, 308 F.2d 187; *Donovan v. Reinbold*, 433 F.2d 738, 741; *Willis v. Reddin*, 418 F.2d 702, 704; *Ney v. California*, 439 F.2d 1285, 1287.

Further, peitioners contend that if California Government Code 911.2 is the limitation period applicable to section 1983 actions, the only question for this Court is its substantive reasonableness. Petitioners have misstated the argument. The question is not so much whether the claims provisions is an

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unconstitutional denial of due process, but whether application of the state claims statute to an action predicated on federal law is unconstitutional under the Supremacy Clause.

Title 42 U.S.C. section 1988 provides for the application of state law in proceedings in vindication of civil rights. However, only those state laws which are "suitable to carry the law into effect" are adopted. *Brazier v. Cherry*, 293 F.2d 401, 409. Respondent contends that Government Code section 911.2 is not suited to carry section 1983 into effect. In fact, applying this statutory provision would be in derrogation of the clear purpose of section 1983 as expressed in *Monroe v. Pape, supra.*

Because the California Courts have determined Government Code section 911.2 not to be a general statute of limitation and the application of this provision would be unconsitutional under the Supremacy Clause of the United States Constitution, respondent asks this Court to declare that section 911.2 is not a limitation period barring section 1983 suits commenced in California State Courts.

CONCLUSION

Respondent respectfully urges this Court to deny the petition for certiorari for lack of jurisdiction. Alternatively, respondent respectfully urges that this Court uphold the lower court findings that concurrent jurisdiction exists over 42 U.S.C. section 1983 actions and that the California Tort Claims Act does not apply to actions brought pursuant to section 1983 in California State Courts.

Respectfully submitted,

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APPENDIX

NEWS RELEASE

ADMINISTRATIVE OFFICE OF THE COURTS
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RELEASE DATE: May 4, 1976

RELEASE #: 53

MAY 6 1976

SUBJECT: Williams v. Horvath
[L.A. 30460]

SUPREME COURT RULES ON LAWSUIT FILED UNDER THE FEDERAL CIVIL RIGHTS ACT

The California Supreme Court today ruled that a federal civil rights lawsuit filed in state court against a government employee is not barred for failure to give 100 days notice of the claim as required by state statute. The Court further held that the government employer may indemnify an employee found liable in such an action. The unanimous opinion was written by Justice Stanley Mosk.

Today's opinion involved an action for damages against various Los Angeles police officers. The complaint alleged that the police officers deprived Charles Williams and other minors of their federal civil rights by unlawfully threatening, imprisoning and hitting them. The minors failed to comply with the notice requirement of California Government Code Section 911.2 before filing their lawsuit in superior court. Section 911.2

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requires that such personal injury claims be presented to the appropriate government employer for evaluation within 100 days after the alleged misconduct.

In ruling that the minors did not have to comply with the notice requirement of the California Tort Claims Act, the Court stated: "the California remedy of recourse to the Tort Claims Act need not be first sought before a plaintiff is free to invoke the Civil Rights Act. While there may be considerable overlap between the two statutes in given circumstances, the purposes underlying them are distinct. The state scheme was conceived to strictly limit governmental liability; the federal legislation, by contrast, was designed to ensure an adequate remedy for violations of civil rights. The 100-day claim provision of section 911.2 is a condition precedent to the maintenance of an action under state law . . . and while it may be constitutionally permissible for the Legislature to place this substantive impediment in the path of a state cause of action, it is clear that the supremacy clause will not permit a like abrogation of the perquisites [*sic*] of a federal civil rights litigant."

In ruling that the government employer may indemnify, or pay the judgment for, the errant employee, the Court noted

that Government Code Section 825 permits the employing entity to pay any such judgment rendered against its employee for his misconduct. The Court then explained: "There is nothing whatever in the language of section 825 to suggest that governmental [*sic*] employees are to be indemnified only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in section 825 to any claim or action negates this inference. Nor, as an analysis of the leading federal cases shows, is there anything in the [Civil Rights Act] which precludes a state from indemnifying public employees when liability is founded upon that [Act]."

#